

IN THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION

|                        |   |                           |
|------------------------|---|---------------------------|
| BILLY BRANTLEY, et al. | : | Case No. C-1-01-378       |
|                        | : |                           |
| Plaintiffs,            | : | Judge Michael H. Watson   |
|                        | : |                           |
| vs.                    | : |                           |
|                        | : |                           |
| CINERGY CORP.          | : | SUPPLEMENTAL AFFIDAVIT OF |
|                        | : | <u>ROBERT D. FEUCHT</u>   |
| Defendant.             | : |                           |

STATE OF OHIO                    )  
  )ss.  
COUNTY OF HAMILTON        )

Comes now affiant, Robert D. Feucht, after being duly cautioned and sworn,  
states as follows:

1. That I am presently employed by Cinergy Services, Inc. as Safety Specialist and have held that position from September 1, 2000 to the present and my job responsibilities include providing safety and other training to employees of the Electric T&D C&M Department.

2. That I am also presently involved in training and act as the custodian of records related to the Seven Steps to a Safer Workplace Program, Weight Limitation ("Weight Program").

3. That the CG&E Employees in the Electric T&D C&M Department were trained and weighed on the date of training in 2003.

4. That employees subject to the Weight Program shall be weighed annually.
5. That on or about March 23, 2004, Todd Tolbert was weighed consistent with the annual weigh-in for the year 2004.
6. That Todd Tolbert weight was 306.0 pounds, which is 31 pounds over the maximum weight limit of 275 pounds.
7. That Exhibit "A" is a true and accurate copy of Todd Tolbert's Weight Limitation Weigh-In Record and weigh-in records since March 23, 2004.
8. That Todd Tolbert was placed on restricted duty status pending the need to resolve the issue of exceeding the maximum body weight.
10. That on or about April 15, 2004, Todd Tolbert went on short-term disability until July 12, 2004.
11. That on or about July 12, 2004, Todd Tolbert was weighed and his weight was 299.2 pounds.
12. That on or about July 13, 2004, a meeting was held with Todd Tolbert and management to discuss his continued failure to meet the physical requirements for performing the Senior Lineperson "A" job and that Exhibit "B" is a true and accurate copy of correspondence from Joiner Wical, Supervisor, Field T&D C&M to Todd Tolbert confirming the discussion at the July 13, 2004 meeting including, but not limited to the discussion that **"Due to the extent of your repeated non-compliance in this area, this was considered your last chance to maintain your employment with the Company relative to this issue."** (emphasis in original)

14. That Todd Tolbert was weighed on July 28, 2004, August 13, 2004 , was not weighed in September due to being on short-term disability and on October 19, 2004 at which time he weighed 260.2 pounds to date.

15. That the records attached hereto as Exhibits "A" and "B" are business records of Cinergy Services, Inc. and/or The Cincinnati Gas & Electric Company which were made at or near the time by, or from information transmitted by a person with knowledge in the course of Cinergy Services, Inc. and/or The Cincinnati Gas & Electric Company's regularly conducted business activities.

16. That I have firsthand knowledge of the above.

FURTHER AFFIANT SAYETH NAUGHT.

10/28/04  
Dated

Robert D. Feucht  
Robert D. Feucht

NOTARY OF PUBLIC

Sworn to and subscribed in my presence this 28<sup>th</sup> day of October, 2004.

Susan M. Wolfram  
Notary Public  
SUSAN M. WOLFRAM  
Notary Public, State of Ohio  
My Commission Expires Sept. 5, 2005

Respectfully submitted,

/s/ Jill T.O'Shea

Jill T. O'Shea (0034692)  
CINERGY SERVICES, INC.  
139 East Fourth St., Room 25 AT II  
Cincinnati, Ohio 45201-0960  
Telephone: (513) 287-2062  
Facsimile: (513) 287-3810

/s/ Gregory V. Mersol

Gregory V. Mersol (0030838)  
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*Attorneys for Defendant  
Cinergy Corp.*

**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing pleading was forwarded via ordinary mail  
this 28<sup>th</sup> day of October, 2004 to:

Paul H. Tobias  
David D. Kammer  
TOBIAS, KRAUS & TORCHIA, LLP  
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Washington, D.C. 20037

/s/ Jill T. O'Shea  
Jill T. O'Shea

## Weight Limitation Weigh-In Record

[illegible]

Cinergy Corp.  
139 East Fourth Street  
P.O. Box 960  
Cincinnati, OH 45201-0960

**CINERGY.**

Todd Tolbert was in on 10-19-04 to be weighed.

Current weight is 260.2

Signed Sandi Steele

Cinergy Corp.  
139 East Fourth Street  
P.O. Box 960  
Cincinnati, OH 45201-0960

**CINERGY.**

TODD TOLBERT was in on 8-13-04 to be weighed.

Current weight is 289.6

Signed Bob Jurek



Cinergy Corp.  
139 East Fourth Street  
P.O. Box 960  
Cincinnati, OH 45201-0960

**CINERGY.**

Todd Tolbert was in on 7-28-04 to be weighed.

Current weight is 290.5

Signed Sandi Steele

Cinergy Corp.  
139 East Fourth Street  
P.O. Box 960  
Cincinnati, OH 45201-0960

**CINERGY.**

TODD TOLBERT was in on 7/12/04 to be weighed.

Current weight is 299.2

Signed Robert D. Smith

Cinergy Corp.  
139 East Fourth Street  
P.O. Box 960  
Cincinnati, OH 45201-0960

July 13, 2004

Mr. Todd Tolbert  
7322 Parkdale Avenue  
Cincinnati, Ohio 45237

Dear Mr. Tolbert:



Reference is made to our meeting on July 13, 2004 to discuss your continued failure to meet the physical requirements for performing your Senior Lineperson "A" job duties due to your continued non-compliance with the maximum body weight limitation of your department. Also in attendance were T. Hoppenjans and your union representative G. Robbins.

As discussed, during an annual safety meeting held March 23, 2004, you and other employees were weighed relative to the departmental safety requirement of maintaining a maximum body weight of 275 lbs. due to the maximum weight capacities of essential equipment used in your job duties. At that time your weight was 306.0 lbs., which is 31 lbs. over the departmental limit. As a result, you were informed of your restricted duty status, pending the need to resolve this issue. Since that time you were on a short-term disability absence and returned to work on July 12, 2004. Your weight of 299.2 lbs. that day was lower, but still 24.2 lbs. over the departmental limit.

As further discussed, the maximum body weight issue has been addressed with you on numerous occasions. You have been warned and advised that you were in jeopardy of termination on multiple occasions in the past for repeated states of unfitness for duty pertaining to the maximum body weight issue.

Consistent with **The Safety & Body Weight Bulletin: Seven Steps to a Safer Workplace** dated February 6, 2003 on which you were trained, you were informed of your expectation to show steady and sustained progress toward the target weight of 275 lbs., which was determined to be the maximum safe body weight while using tools and equipment. Documentation from your treating physician established a targeted rate of weight loss of 3 lbs. per month. Based on this rate, you are expected to have reached the required maximum body weight by the goal date of April 1, 2005.

Company policy states that, "Disciplinary action, up to and including discharge, may be imposed if the employee fails to demonstrate progress toward meeting the employee's required weight loss, or if the employee is unsuccessful in reaching the required maximum body weight by the goal date." As was discussed with you, permanent restricted duty is not available. **Due to the extent of your repeated non-compliance in this area, this is considered your last chance to maintain your employment with the Company relative to this issue.** The Company's tolerance of your repeated violations of the maximum weight limitation and safety issue has been exhausted.

in accordance with **The Safety & Body Weight Bulletin: Seven Steps to a Safer Workplace**, you were informed of your requirement to demonstrate steady and sustained progress in meeting your targeted monthly rate of weight loss, including not experiencing substantial or repeated weight gain. Due to your repeated history of non-compliance, you will be weighed on a bi-weekly basis. Failure on your part to demonstrate the steady and sustained progress related above will subject you to discharge. Any attempt by you to engage in conduct that manipulates the Company's monitoring or is a refusal to submit to being weighed, will subject you to immediate discharge. Your failure to reach the maximum body weight limitation of your department prior to April 1, 2005 will subject you to discharge.

Once you achieve compliance on or before April 1, 2005, should you again exceed the maximum body weight requirement at any time in the future you will be discharged as a result of your history of non-compliance with this safety requirement.

The Company will continue the restricted duty assignment only as long as business circumstances allow and if you demonstrate progress as defined above. You will not be eligible for unscheduled overtime until such time that you are compliant with the maximum weight limitation. Only if it were known in advance that the work falls within your restricted duty assignment would you be considered eligible for scheduled overtime job assignments.

Both the Company and employees have certain obligations they must meet in their employment relationship. One of the Company's obligations is to provide a safe and healthy work place for its employees. The Company takes the position that maintaining an acceptable body weight is the sole responsibility of the employee. It has been repeatedly emphasized with you that one of the employee's basic obligations to the Company is to be ready, willing and able to work. It is the Company's sincere hope that you will be successful in restoring your qualifications to perform your Senior Lineperson "A" position so that discharge will not be a consideration in the future.

You were also informed that if there are personal issues of any nature that may be contributing to this situation, the Company's APS Employee Assistance Program is available to you at no cost and that all discussions are strictly confidential.

Sincerely,



John Wical  
Supervisor,  
Field T&D Construction & Maintenance

Cc S. Feldhaus (IBEW)  
D. Crail  
R. Feucht  
J. Polley  
J. Stanley